

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANAE SCHMITZER,

Plaintiff,

v.

MARTIN O'MALLEY, Commissioner of  
Social Security,<sup>1</sup>

Defendant.

Case No. 1:22-cv-01038-JLT-BAM

**FINDINGS AND RECOMMENDATIONS  
REGARDING PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

(Docs. 17, 19.)

**INTRODUCTION**

Plaintiff Danae Schmitzer ("Plaintiff") seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying her application for Disability Insurance under Title II of the Social Security Act. The parties' briefing on the motion was submitted, without oral argument, to Magistrate Judge Barbara A. McAuliffe for findings and recommendations. (Docs. 17, 19.)

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<sup>1</sup> Martin O'Malley became the Commissioner of Social Security on December 20, 2023. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Martin O'Malley is substituted for Kilolo Kijakazi as Defendant in this suit.

1 Having considered the parties' briefs, along with the entire record in this case, the Court finds  
 2 that the decision of the Administrative Law Judge ("ALJ") is supported by substantial evidence in the  
 3 record and is based upon proper legal standards. Accordingly, this Court will recommend affirming  
 4 the agency's determination to deny benefits.

### 5 **FACTS AND PRIOR PROCEEDINGS**

6 Plaintiff applied for Title II Disability Insurance on October 3, 2018, alleging that she became  
 7 disabled on May 23, 2017. AR 301-309.<sup>2</sup> Plaintiff's application was denied initially on January 17,  
 8 2019, and on reconsideration on April 5, 2019. AR 127-131, 135-140. Plaintiff requested a hearing  
 9 before an administrative law judge ("ALJ") and ALJ Lynn Ginsberg held a hearing on May 14, 2021.  
 10 AR 69-101. ALJ Ginsberg issued an order denying benefits on the basis that Plaintiff was not disabled  
 11 on August 16, 2021. AR 13-41. Plaintiff sought review of the ALJ's decision, which the Appeals  
 12 Council denied. AR 1-7. This appeal followed.

#### 13 **May 14, 2021 Hearing Testimony**

14 ALJ Lynn Ginsberg held a telephonic hearing on May 14, 2021. AR 69-101. Plaintiff  
 15 appeared and was represented by her attorney, Jonathan Pena. Daniel Best, an impartial vocational  
 16 expert, also appeared and testified. AR 93-100. The ALJ began by admitting Exhibits 1A through  
 17 4A, 1B through 19B, 1D through 8D, 1E through 16E, and 1F through 77F into evidence. AR 74.

18 Upon examination by the ALJ, Plaintiff testified that her Workers' Comp case was pending  
 19 and that it was in the discovery or information-gathering stage. AR 74-75. For that case, Plaintiff  
 20 stated that she was not aware of needing to see another doctor for evaluation. Plaintiff testified that she  
 21 was not receiving benefits from her former employer and had not received them at any point after her  
 22 exposure. AR 75. Plaintiff stated that her former employer had not settled or paid for doctor bills or  
 23 testing in relation to her exposure and injury. *Id.* Plaintiff testified that she would need ongoing  
 24 treatment, which she would need due to "a lot of different medical problems." AR 76. Plaintiff  
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27  
 28 <sup>2</sup> References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

1 testified that she was at that time not seeing a therapist or psychiatrist as she could not afford anything  
2 despite Dr. Johnson making a recommendation. *Id.*

3 Plaintiff testified that she lived by herself with no pets. *Id.* She stated that she would rest  
4 when her fatigue is flared up, would take a shower, would get dressed when she felt well, and would  
5 run errands to the grocery store. AR 76-77. Plaintiff further testified that she walks and would meet  
6 up with friends for lunch or a walk when she felt up to it. AR 77. Plaintiff stated that the amount she  
7 could walk varied from day to day, but she could at least walk around the block. *Id.* She said that  
8 during COVID she did not meet with friends, but she otherwise met with friends at least once a month.  
9 *Id.* Plaintiff stated that she would go to the store approximately every two weeks and would walk  
10 around the block approximately two or three times per week. *Id.*

11 Plaintiff testified that CIRS caused debilitating fatigue that prevented her from working. AR  
12 78. She stated that there were many triggers for inflammation and also noted that sleeping was  
13 difficult as she has a 100% blockage in the right side of her nose. *Id.* Plaintiff testified that Dr. Jim  
14 Lysander diagnosed her with CIRS. *Id.*

15 Plaintiff's attorney added that the diagnosis was in the record as part of Exhibit 64F and 65F.  
16 AR 78-79. Plaintiff's attorney further noted that the CIRS diagnosis was conclusive and the chronic  
17 fatigue syndrome diagnosis was ongoing. AR 79-80. Plaintiff's attorney further stated that Dr.  
18 Lysander's report was obtained in relation to Plaintiff's Workers' Compensation case. AR 80.  
19 Plaintiff's attorney noted that Plaintiff provided a function-by-function Medical Source Statement of  
20 Plaintiff's impairments by Dr. Lysander in Social Security vocational terms as part of Exhibit 64F.  
21 AR 81. Plaintiff's counsel further stated that counsel did not pay the provider for opinions, but  
22 Plaintiff's insurance or Plaintiff paid for the medical opinion. *Id.*

23 In response to questions from her attorney, Plaintiff testified that her fatigue caused her the  
24 most difficulty in returning to a full-time job. AR 82. Plaintiff testified that when she felt fatigued,  
25 she had aches and pains and felt the sudden need to rest and lie down. Plaintiff testified that in 2017  
26 she felt fatigued five days per week, on average. AR 82-83. Plaintiff stated that the fatigue would last  
27 different amounts of time, from a short while to a full day, and she had "more bad days than good  
28 days." AR 83. Plaintiff testified that she usually experienced the worst pain in her hands and legs, but

1 also had chronic inflammation all over her body. *Id.* Plaintiff stated that the pain could be sharp or  
2 dull, and the inflammation was worst in her arms and legs. AR 83-84. She testified that she has  
3 swelling in her lower legs, has “weird skin things” on her legs, and sometimes would have a skin rash  
4 on her face and neck. AR 84-85. Plaintiff said that the swelling occurred “all the time” in her lower  
5 legs, ankles, and feet, and the swelling worsened when she stood or sat a lot. AR 85. Plaintiff would  
6 treat the swelling by elevating her legs above her heart, and her doctor recommended she get some  
7 compression stockings. AR 85-86. Plaintiff testified that she had flareups and tingling in her hands  
8 throughout the day. AR 86-87. She said that she could do manipulative activities like folding clothes  
9 or holding the phone and move her hands around when they became numb. AR 87.

10 Plaintiff testified that in an average day she could lift and carry approximately 15 or 20  
11 pounds. AR 87-88. Plaintiff also testified that she had shortness of breath due to restrictive lung  
12 disease and her breathing has gotten worse. AR 88. She testified that her doctors recommended  
13 activities to improve her lungs. *Id.* Plaintiff said that any kind of exertion, including yoga, walking  
14 around the block, or walking to do grocery shopping, gave her shortness of breath. AR 88-89.  
15 Plaintiff stated that she did not use inhalers or nebulizers to help with shortness of breath. *Id.* Plaintiff  
16 stated that she worked up to doing some recommended yoga and breathing classes to help with her  
17 shortness of breath. AR 89-90. She further testified that she was now “super sensitive” to  
18 environmental irritants, which affected her breathing. AR 90.

19 Plaintiff testified that in an average day, she would need to lie down and rest for at least two to  
20 three hours. AR 91. Plaintiff testified that her impairment “bad days” last for at least half of a given  
21 month. AR 91-92. Plaintiff testified that she was able to do daily activities including bathe on her  
22 own, put on her own clothes, and feed herself. AR 92. Plaintiff testified that she could concentrate for  
23 approximately 45 minutes before needing a mental break. *Id.* Plaintiff also stated that she was still  
24 having issues with brain fog and memory issues and said that those issues led her to repeat things and  
25 find items where they did not belong. *Id.*

26 Following Plaintiff’s testimony, the ALJ elicited testimony from vocational expert (“VE”)  
27 Daniel Best. AR 93-100. The VE testified that his resume on record correctly stated his  
28 qualifications, that he had not had prior personal or professional interactions with Plaintiff, that he

1 understood that he was to be an impartial witness, that he had not had discussions regarding the merits  
2 of the case, and that he was familiar with the Social Security Administration's definitions of the  
3 exertional requirements of work and skill levels contained in the Dictionary of Occupational Titles.  
4 AR 93-94. The VE further testified that he was aware that he should inform the ALJ if his opinion  
5 conflicted with the information in the Dictionary of Occupational Titles and that he had reviewed the  
6 records available to him prior to the hearing. AR 94. Plaintiff's counsel stated that he had no  
7 objections to the VE serving as vocational expert in the matter. *Id.* The VE classified Plaintiff's past  
8 work as Store Manager (DOT No. 185.167-046, light work, skilled, SVP 7); Advertising Manager  
9 (DOT No. 163.167-010, sedentary work, skilled, SVP 8); and Administrative Officer (DOT No.  
10 169.167-010, sedentary work, skilled, SVP 7). AR 94-95.

11 The ALJ then asked the VE hypothetical questions. For the first hypothetical, the ALJ asked  
12 the VE to consider a hypothetical person who could lift and carry up to 20 pounds occasionally and 10  
13 pounds frequently; could stand and walk for about six hours; could sit for about six hours in an eight-  
14 hour workday with normal breaks; could never climb ladders, ropes, or scaffolds; could occasionally  
15 climb ramps and stairs; could have occasional exposure to temperature extremes or hot and cold; could  
16 have occasional exposure to wetness and humidity; could have occasional exposure to excessive noise,  
17 could have occasional exposure to excessive vibration; could have occasional exposure to  
18 environmental irritants, such as fumes, odors, dusts, and gases; could have no exposure to poorly  
19 ventilated areas; could have no exposure to chemicals; could have no exposure to unprotected heights;  
20 could have no use of moving hazardous machinery; could understand and remember instructions that  
21 could be learned after a brief demonstration or up to 30 days of on-the-job training; could keep  
22 sufficient pace to complete tasks and meet quotas typically found in unskilled work; could have only  
23 superficial face-to-face interaction with the public but no limits on phone interaction; could adapt to  
24 frequent changes in the workplace. AR 95-96. The VE responded that none of Plaintiff's past work  
25 would be available, but other jobs examples would match the hypothetical individual's limitations,  
26 including: Small Products Assembler II (DOT No. 739.687-030, light, SVP 2, 19,000 jobs nationally);  
27 Bench Assembler (DOT No. 706.684-042, light, SVP 2, 27,000 jobs nationally); and Packer/Inspector  
28 (DOT No. 784.687-042, light, SVP 2, 21,500 jobs nationally). AR 96.

1 For the second hypothetical, the ALJ added that the hypothetical individual would only be able  
2 to stand and walk for approximately four hours in an eight-hour workday and could only perform  
3 bilateral handling, fingering, and feeling frequently. AR 97. The VE testified that there would leave  
4 the Assembler (DOT No. 706.684-042, light, SVP 2, 27,000 jobs nationally) with a reduction in job  
5 numbers of approximately 50 percent. *Id.* The VE further testified that this limitation would not  
6 allow the Small Products Assembler II or Packer/Inspector jobs, but would permit for Electronics  
7 Worker (DOT No. 726.687-010, light work, SVP 2, 28,000 jobs nationally) which would not have an  
8 erosion of job numbers and Inspector/Hand Packager (DOT No. 559.687-074, light work, SVP 2,  
9 65,000 jobs nationally) which would have a 50 percent reduction in job numbers given the standing  
10 and walking limitations. *Id.*

11 For the third hypothetical, the ALJ added that the individual would be off task twenty percent  
12 of the time due to impairments. AR 98. The VE testified that this would not allow performance of  
13 jobs to competitive work standards. *Id.* The VE testified that, based upon his experience, a worker  
14 being off for ten to fifteen percent of a work shift on a daily, ongoing basis would preclude  
15 competitive work. *Id.*

16 For the following hypothetical, the ALJ added that the hypothetical individual would have to  
17 be absent or late three times a month or so. *Id.* The VE testified that this would exceed the allowable  
18 number of sick and vacation days and would therefore not allow for the performance of competitive  
19 work. *Id.*

20 Under examination from Plaintiff's attorney, Plaintiff's attorney asked whether the  
21 hypothetical individual from the first hypothetical could perform any work if the individual also would  
22 need to elevate their lower extremities above waist level for three hours in an average day. AR 99.  
23 The VE testified that this would preclude work as that would not be allowable in a competitive work  
24 environment. *Id.*

25 Plaintiff's attorney then added to the first hypothetical that the individual would have to take  
26 five unscheduled breaks a day that would last for 15 minutes each. *Id.* The VE testified that the  
27 hypothetical individual could not perform any work as that would not be tolerated in a competitive  
28 work situation. *Id.*

1 Plaintiff's attorney then asked whether jobs would remain for a hypothetical person who could  
2 lift and carry twenty pounds occasionally; could lift and carry ten pounds frequently; could stand and  
3 walk for four hours; would be limited to occasional stooping, crouching, and crawling; could not  
4 climb ladders or ropes; must avoid all dusts, fumes, mold, poor ventilated areas, extreme heat, extreme  
5 cold; and would be limited to occasional handling, fingering, and feeling. AR 99-100. The VE  
6 testified that such an individual could not perform any of the previous light jobs identified, and there  
7 would be no other work given the combination of no face-to-face customer service, limitations in  
8 sitting, and upper extremity limitations. AR 100.

9 **Medical Record**

10 The relevant medical record was reviewed by the Court and will be referenced below as  
11 necessary to this Court's decision.

12 **The ALJ's Decision**

13 Using the Social Security Administration's five-step sequential evaluation process, the ALJ  
14 determined that Plaintiff was not disabled under the Social Security Act. AR 13-41. Specifically, the  
15 ALJ found that Plaintiff had not engaged in substantial gainful activity from since the alleged onset  
16 date of May 23, 2017. AR 18. The ALJ identified the following severe impairments: adjustment  
17 disorder, anxiety disorder, chronic fatigue, chronic inflammatory response syndrome (CIRS), and a  
18 cardiac impairment. AR 18-19. The ALJ also identified the non-severe impairment of breast cysts.  
19 *Id.* The ALJ determined that Plaintiff did not have an impairment or combination of impairments that  
20 met or medically equaled any of the listed impairments. AR 19-21.

21 Based on a review of the entire record, the ALJ found that Plaintiff retained the RFC to  
22 perform light work with the limitations that Plaintiff was limited to: lift and carry up to twenty pounds  
23 occasionally and ten pounds frequently; stand and/or walk for about six hours and sit for about six  
24 hours in an eight hour workday with normal breaks; never climb ladders, ropes or scaffolds;  
25 occasionally climb ramps or stairs; have occasional exposure to extreme temperatures of hot and cold;  
26 occasional exposure to wetness or humidity; occasional exposure to excessive noise and excessive  
27 vibration; occasional exposure to environmental irritants such as fumes, odors, dust, and gases; no  
28 exposure to poorly ventilated areas; no exposure to chemicals; no exposure to unprotected heights and



1 no use of moving hazardous machinery; understand and remember instructions that can be learned  
 2 after a brief demonstration or up to thirty days of on-the-job training; can keep pace sufficient to  
 3 complete tasks and meet quotas typically found in unskilled work; superficial face-to-face interactions  
 4 with the public, but no limits on phone interaction; and can adapt to frequent changes in the  
 5 workplace. AR 22-29. The ALJ considered “all symptoms and the extent to which these symptoms  
 6 can reasonably be accepted as consistent with the objective medical evidence and other evidence,” as  
 7 well as “medical opinion(s) and prior administrative medical finding(s).” AR 22; 22-29.

8 Given this RFC, the ALJ found that Plaintiff was unable to perform any past relevant work.  
 9 AR 29. However, the ALJ found that there were jobs that exist in significant numbers in the national  
 10 economy that Plaintiff could perform. AR 30-31. The ALJ noted that examples of jobs consistent  
 11 with Plaintiff’s RFC included: (1) Small Products Assembler, (DOT No. 739.687-030, light, SVP 2,  
 12 19,000 jobs nationally); (2) Bench Assembler (DOT No. 706.684-042, light, SVP 2, 27,000 jobs  
 13 nationally); (3) Packer Inspector, (DOT No. 784.687-042, light, SVP 2, 21,500 jobs nationally). AR  
 14 30. The ALJ also found that the VE’s testimony was consistent with the Dictionary of Occupational  
 15 Titles. AR 31. The ALJ therefore concluded that Plaintiff had not been disabled from May 23, 2017,  
 16 through the date of the decision. *Id.*

### 17 **SCOPE OF REVIEW**

18 Congress has provided a limited scope of judicial review of the Commissioner’s decision to  
 19 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, this  
 20 Court must determine whether the decision of the Commissioner is supported by substantial evidence.  
 21 42 U.S.C. § 405(g). Substantial evidence means “more than a mere scintilla,” *Richardson v. Perales*,  
 22 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,  
 23 1119, n. 10 (9th Cir. 1975). It is “such relevant evidence as a reasonable mind might accept as  
 24 adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The record as a whole must be  
 25 considered, weighing both the evidence that supports and the evidence that detracts from the  
 26 Commissioner’s conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the  
 27 evidence and making findings, the Commissioner must apply the proper legal standards. *E.g.*,  
 28 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner’s



determination that the claimant is not disabled if the Commissioner applied the proper legal standards, and if the Commissioner's findings are supported by substantial evidence. *See Sanchez v. Sec'y of Health and Human Servs.*, 812 F.2d 509, 510 (9th Cir. 1987).

### **REVIEW**

In order to qualify for benefits, a claimant must establish that he or she is unable to engage in substantial gainful activity due to a medically determinable physical or mental impairment which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 1382c(a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such severity that he or she is not only unable to do his or her previous work, but cannot, considering his or her age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990).

### **DISCUSSION**<sup>3</sup>

Plaintiff contends that the ALJ erred in her step two analysis and failed to consider the effects of Plaintiff's Mast Cell Activation Syndrome ("MCAS") as part of the RFC. (Doc. 17 at 15-18.) Plaintiff further contends that the ALJ's RFC assessment was unsupported by anything other than the ALJ's lay interpretation of the evidence. (*Id.* at 18-20.) Plaintiff also contends that the ALJ improperly rejected the opinions of Plaintiff's physicians Dr. Pietruszka and Dr. Jim. (*Id.* at 20-23.)

#### **A. Step Two Impairments**

Plaintiff argues that the ALJ erred by failing to consider the effects of Plaintiff's Mast Cell Activation Syndrome at step two or as part of the RFC. (Doc. 17 at 15-18.)

At step two of the five-step sequential evaluation, the ALJ is required to determine whether a plaintiff has a "severe" medical impairment or combination of impairments. 20 C.F.R. § 404.1520(c). An impairment, or combination of impairments, can be found to be non-severe if the evidence

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<sup>3</sup> The parties are advised that this Court has carefully reviewed and considered all of the briefs, including arguments, points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific argument or brief is not to be construed that the Court did not consider the argument or brief.

1 establishes a slight abnormality that has no more than a minimal effect on an individual's ability to  
2 work. *See* SSR 85–28, 1985 WL 56856 (Jan. 1, 1985); *see also Yuckert v. Bowen*, 841 F.2d 303, 306  
3 (9th Cir.1988) (adopting SSR 85–28). “The mere existence of an impairment is insufficient proof of a  
4 disability.” *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir.1993). A claimant bears the burden of  
5 proving that an impairment is disabling. *Id.* (citation omitted).

6 “Step two is merely a threshold determination meant to screen out weak claims.” *Buck v.*  
7 *Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017), citing *Bowen v. Yuckert*, 482 U.S. 137, 146–47 (1987).  
8 “It is not meant to identify the impairments that should be taken into account when determining the  
9 RFC . . . . The RFC . . . *should* be exactly the same regardless of whether certain impairments are  
10 considered ‘severe’ or not.” *Id.* (emphasis in original). Any error in failing to include an impairment  
11 at step two is harmless if the ALJ considered any limitations imposed by the impairment at step four.  
12 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (“The decision reflects that the ALJ considered any  
13 limitations posed by the bursitis at Step 4. As such, any error that the ALJ made in failing to include  
14 the bursitis at Step 2 was harmless.”).

15 At step two, the ALJ found Plaintiff had severe impairments of adjustment disorder, anxiety  
16 disorder, chronic fatigue, chronic inflammatory response syndrome (CIRS), and a cardiac impairment,  
17 and noted that the “above medically determinable impairments significantly limit the ability to  
18 perform basic work activities.” AR 18-19. The ALJ further found that Plaintiff had the non-severe  
19 impairment of breast cysts, which “would have no more than a minimal effect on an individual’s  
20 ability to work.” AR 19. The ALJ did not address MCAS. *See* AR 18-19.

21 Plaintiff argues that the ALJ ignored the MCAS assessment from Dr. Jim’s medical records  
22 and fatigue symptoms resulting from Plaintiff’s MCAS. (Doc. 17 at 16-17.) As part of this argument,  
23 Plaintiff contends that the main symptom of MCAS is fatigue, and notes that fatigue was commonly  
24 reported to Plaintiff’s various physicians both before and after the diagnosis. (*Id.*) Defendant  
25 responds that the record evidence of MCAS is limited and the ALJ considered the key MCAS  
26 symptom of fatigue as part of the RFC assessment. (Doc. 19 at 10-11.)

27 Here, even though the ALJ does not reference MCAS at step two, the ALJ assesses and  
28 incorporates the resulting fatigue limitation in determining the RFC. AR 23-24 (reducing exertional

1 levels, including climbing limitations, including limitations related to exposure to heights and  
 2 hazardous machinery, and including limitation on interactions with the public in RFC due to fatigue).  
 3 The RFC addressed Plaintiff's fatigue and the resulting RFC was the same regardless of the ALJ  
 4 labeling MCAS "severe." Accordingly, the ALJ did not err in her step two analysis. *See Buck*, 869  
 5 F.3d at 1048 ("The RFC . . . *should* be exactly the same regardless of whether certain impairments are  
 6 considered 'severe' or not.").

7 Furthermore, even if the ALJ erred by failing to include MCAS at step two, any error is  
 8 harmless because the ALJ considered the limitations imposed by MCAS at step four. *See Lewis*, 498  
 9 F. 3d at 911. Plaintiff suggests that fatigue was the primary limitation resulting from MCAS, as  
 10 reflected in Plaintiff's medical record. (Doc. 17 at 16-17.) The ALJ, however, considered and  
 11 accounted for fatigue at step four in assessing medical opinions and formulating the RFC. AR 22 ("At  
 12 the hearing, the claimant testified that she is unable to work due to feeling fatigued and having no  
 13 energy"); 23 (Plaintiff "also experiences chronic fatigue"); 23-24 (reducing exertional levels,  
 14 including climbing limitations, including limitations related to exposure to heights and hazardous  
 15 machinery, and including limitation on interactions with the public in RFC due to fatigue); 24-28  
 16 (noting Plaintiff's chronic fatigue in assessing medical opinions). Because the ALJ considered  
 17 Plaintiff's fatigue limitation at step four, any error resulting from the non-inclusion of MCAS at step  
 18 two is harmless.

19 Accordingly, the Court finds that the ALJ did not make a reversible error at step two of her  
 20 analysis.

## 21 **B. Residual Functional Capacity**

22 Plaintiff next argues that the ALJ's RFC assessment was unsupported by anything other than  
 23 her own lay interpretation of the evidence. (*Id.* at 18-20.)

24 An RFC "is the most [one] can still do despite [his or her] limitations" and it is "based on all  
 25 the relevant evidence in [one's] case record," rather than a single medical opinion or piece of  
 26 evidence. 20 C.F.R. § 404.1545(a)(1). Indeed, "an ALJ's RFC determination need not precisely  
 27 reflect any particular medical provider's assessment." *Pinto v. Kijakazi*, No. 1:21-cv-00585-SKO,  
 28 2022 WL 17324913, at \*9 (E.D. Cal. Nov. 29, 2022) (citing *Turner v. Comm'r Soc. Sec. Admin.*, 613

1 F.3d 1217, 1222-23 (9th Cir. 2010)); see also *Chapo v. Astrue*, 682 F.3d 1285, 1288 (10th Cir. 2012)  
2 (finding RFC determination need not directly correspond to a specific medical opinion). The Ninth  
3 Circuit has also made clear that “it is the responsibility of the ALJ, not the claimant’s physician, to  
4 determine residual functional capacity.” *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).

5 Plaintiff argues that because the ALJ found state agency and physicians’ assessments  
6 unpersuasive as to there being severe physical impairments, disagreed with Plaintiff’s treating  
7 physicians’ assessments, and disagreed with Plaintiff’s own assessment that she could not perform any  
8 work, the ALJ was left with an evidentiary deficit that she was not permitted to fill with her own lay  
9 opinion. (Doc. 17 at 19.) However, that misstates the ALJ’s actions in assessing the medical opinions  
10 and Plaintiff’s RFC. In formulating the RFC, the ALJ found that state agency consultants E. Wong  
11 and W. Jackson’s opinions were “not found to be fully persuasive.” AR 24-25. The ALJ also found  
12 the opinions of state agency consultants J. Collado and Richard Willens and consultative examiner  
13 Mickey Sachdeva to not be “fully persuasive.” AR 25. The ALJ further found the opinions of  
14 physicians Marvin Pietruszka and Lysander Jim to not be “fully persuasive.” AR 25-26, 27-28. The  
15 ALJ found the opinion of physician Nachman Brautbar to be “partially persuasive.” AR 26-27. The  
16 ALJ stated that the opinions of Scott T. Anderson and Gary Hatcher were “not found to be  
17 persuasive.” AR 27. The ALJ also found the opinions of state agency medical consultants Aileen H.  
18 McAlister and Jeffery Merrill to not be “fully persuasive.” AR 28-29. The ALJ assessed each of these  
19 opinions based upon their consistency with the overall record and their supportability from the  
20 examiners’ own findings and notes, and only fully discounted the opinions of Scott T. Anderson and  
21 Gary Hatcher as not persuasive. *See* AR 24-29; 20 C.F.R. § 404.1520c(c)(1)-(5) (The Commissioner  
22 evaluates the persuasiveness of the medical opinions based on the following factors: (1) supportability;  
23 (2) consistency; (3) relationship with the claimant; (4) specialization; and (5) other factors, such as  
24 “evidence showing a medical source has familiarity with the other evidence in the claim or an  
25 understanding of our disability program’s policies and evidentiary requirements.”); 20 C.F.R. §  
26 404.1520c(b)(2) (“Supportability and consistency are the most important factors.”).

27 Rather than improperly substituting her own opinion, the ALJ considered the opinions of the  
28 state agency consultants, other physicians, Plaintiff’s allegations regarding her impairments, and

1 Plaintiff's treatment records. The ALJ incorporated physicians' findings, Plaintiff's statements  
 2 regarding her symptoms, and other medical evidence in determining the RFC. *See* AR 23-24  
 3 (discussing physician findings, Plaintiff's statements, and other medical evidence in relation to  
 4 Plaintiff's CIRS, cough and shortness of breath, fear, stress, brain fog, fatigue, musculoskeletal status,  
 5 and daily activities); 29 (discussing Plaintiff's capacity in relation to provider findings and other  
 6 medical evidence).

7 Accordingly, the Court finds that the ALJ did not err in her assessment of the RFC.

### 8 **C. Medical Opinion Evidence**

9 Plaintiff next contends that the ALJ erred by rejecting the opinion evidence of Dr. Marvin  
 10 Pietruszka and Dr. Lysander Jim without setting forth specific, legitimate reasons for doing so. (Doc.  
 11 17 at 21-23.)

12 Because Plaintiff applied for benefits after March 27, 2017, her claim is governed by the  
 13 agency's new regulations concerning how an ALJ must evaluate medical opinions. 20 C.F.R. §  
 14 404.1520c. Under the new regulations, the Commissioner does "not defer or give any specific  
 15 evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative  
 16 medical finding(s), including those from [a claimant's] medical sources." 20 C.F.R. § 404.1520c(a).

17 The Commissioner evaluates the persuasiveness of the medical opinions based on the  
 18 following factors: (1) supportability; (2) consistency; (3) relationship with the claimant; (4)  
 19 specialization; and (5) other factors, such as "evidence showing a medical source has familiarity with  
 20 the other evidence in the claim or an understanding of our disability program's policies and  
 21 evidentiary requirements." 20 C.F.R. § 404.1520c(c)(1)-(5). Supportability and consistency are the  
 22 most important factors. 20 C.F.R. § 404.1520c(b)(2).

23 Ninth Circuit case law preceding the new regulations afforded deference to the medical  
 24 opinions of treating and examining physicians. Indeed, prior to the current regulations, the Ninth  
 25 Circuit required ALJs to provide clear and convincing or specific and legitimate reasons for rejecting  
 26 the medical opinions of treating or examining physicians. Contrary to Plaintiff's suggestion, these  
 27 standards of articulation no longer apply in light of the new regulations, and the ALJ was not required  
 28 to provide "specific and legitimate reasons" to discount the medical opinions. *See Woods v. Kijakazi*,

32 F.4th 785, 792 (9th Cir. 2022) (finding revised social security regulations “clearly irreconcilable with our caselaw according special deference to the opinions of treating and examining physicians on account of their relationship with the claimant”). However, the Ninth Circuit has clarified that “under the new regulations, an ALJ cannot reject an examining or treating doctor’s opinion as unsupported or inconsistent without providing an explanation supported by substantial evidence.” *Id.* “The agency must ‘articulate ... how persuasive’ it finds ‘all of the medical opinions’ from each doctor or other source, . . . and ‘explain how [it] considered the supportability and consistency factors’ in reaching these findings.” *Id.* (internal citations omitted); *see* 20 C.F.R. § 404.1520c(c). In this context,

Supportability means the extent to which a medical source supports the medical opinion by explaining the “relevant ... objective medical evidence. *Id.* § 404.1520c(c)(1). Consistency means the extent to which a medical opinion is “consistent ... with the evidence from other medical sources and nonmedical sources in the claim. *Id.* § 404.1520c(c)(2).

*Id.* at 791-92.

#### 1. Opinions of Dr. Pietruszka

Dr. Marvin Pietruszka issued three sets of opined limitations. First, on August 23, 2016, Dr. Pietruszka completed a Permanent and Stationary Report. AR 2711-2723. In the report, Dr. Pietruszka included work restrictions: “The patient is precluded from working in an environment in which she would be re-exposed to mold. Such exposure would exacerbate her multiple mold-related symptomatology.” AR 2720. Dr. Pietruszka discussed Plaintiff’s job description; history of injury related to her cough, dizzy-spells, irritation of the eyes, blurry vision, pounding heart, and shortness of breath; prior treatment; previous work; occupational exposure; past medical history; social history; family history; review of systems including Plaintiff’s reported symptoms of headaches, eye and vision issues, cough and throat pain, depression, difficulty concentrating, difficulty sleeping, and forgetfulness, abnormal hair loss and a dermatological condition; and current medication. AR 2712-2715. Dr. Pietruszka’s physical examination noted normal skin findings, normal head findings, normal EENT findings with “mild injection of the sclera of both eyes,” normal thorax findings, normal abdomen findings, normal musculoskeletal findings, normal neurological findings, radiological findings from September 2014 showing a “mild increase in -bronchial markings bilaterally,” “mild opacification .the left maxillary sinus,” “marked narrowing of the nasal passages,” and “bilateral

1 turbinate hypertrophy;” and normal laboratory findings with elevated total cholesterol and HDL. AR  
2 2715–17. Dr. Pietruszka listed Plaintiff’s subjective complaints, as well as objective findings which  
3 included: abnormal chest x-ray, abnormal sinus x-ray, normal cardiac findings except for an elevated  
4 velocity index, negative CT scan of bilateral sinuses, and results of an allergy panel. AR 2717-18. Dr.  
5 Pietruszka’s diagnoses included: history of exposure to indoor mold; bronchitis secondary to mold  
6 exposure; sinusitis, mild, secondary to mold exposure; cephalgia, secondary to mold exposure;  
7 conjunctivitis, secondary to mold exposure; palpitations; chronic fatigue syndrome, secondary to mold  
8 exposure; depressive disorder, possibly secondary to mold exposure; anxiety disorder. AR 2718. Dr.  
9 Pietruszka further noted: “The patient is declared permanent and stationary as of today, August 23,  
10 2016, on an occupational medicine basis.” *Id.* He further included a causation analysis and brief  
11 treatment plan to continue with her current medications and be reevaluated in one month. AR 2719-  
12 20. Dr. Pietruszka further included his assessments related to impairment ratings, apportionment,  
13 future medical care, vocational rehabilitation, and fee disclosure. AR 2720-21.

14 Second, on November 1, 2018, Dr. Pietruszka also completed a Supplemental Report in which  
15 he opined that Plaintiff “was declared permanent and stationary since August 23, 2016. She is to  
16 remain on temporary and total disability for a period of three months.” AR 759; AR 754-760  
17 (November 1, 2018 Supplemental Report).

18 Third, on February 19, 2020, Dr. Pietruszka completed a Physical Residual Function Capacity  
19 Medical Source Statement in which he included the diagnoses: “Exposure to indoor mold (industrial),  
20 chronic bronchitis, chronic sinusitis, cephalgia, conjunctivitis, palpitations, chronic fatigue,  
21 depression, anxiety” and included a prognosis of “still symptomatic and not improving.” AR 776. He  
22 further listed Plaintiff’s symptoms as “NECFS, joint pain, heart palpitations, foggy brain, skin rash,  
23 blurry vision, blood shot eyes, night sweats and chills, hair loss, stomach pain” and described  
24 Plaintiff’s pain as “joint pain, elbows, knees, ankles, hip, hands and wrist, back pain, joint stiffness...”  
25 *Id.* He checked that Plaintiff’s impairments, symptoms, and limitations have lasted since the date that  
26 Plaintiff claimed she could no longer work. *Id.* He further checked that Plaintiff could lift 20 pounds  
27 or more occasionally. AR 776-777. Dr. Pietruszka noted that Plaintiff could not walk one city block  
28 or more without rest or severe pain, could not walk one block or more on rough or uneven ground,



1 could not climb steps without the use of a handrail at a reasonable pace, had problems with balance  
2 when ambulating, had problems with stooping, crouching, and bending, and must lie down or recline  
3 for one to two hours before sitting up, standing up, or walking around. AR 777. He checked fatigue  
4 and pain as reasons why Plaintiff needed to lie down and/or recline during the day and checked that  
5 Plaintiff would need to lie down and/or recline approximately two to three hours during an eight-hour  
6 workday. *Id.* He also checked that Plaintiff could sit approximately two to three hours and stand and  
7 walk approximately two to four hours in an eight-hour workday. *Id.* Dr. Pietruszka also noted that  
8 Plaintiff would need to take an unscheduled break every two to three hours depending on the day,  
9 would have to rest two to four hours before returning to work, and would need to lie down or sit  
10 quietly during the breaks. AR 777-78. He checked that Plaintiff did not need to elevate her legs  
11 during prolonged sitting, would not need a cane or other assistive device while walking, could do  
12 hand, finger, and arm manipulations “100%” of the time during an eight-hour workday, could not push  
13 and pull arm or leg controls from a sitting position for six or more hours per eight-hour workday,  
14 could climb stairs and ramps, could not climb ladders or scaffolds or ropes. AR 778. Dr. Pietruszka  
15 also noted that Plaintiff suffered from depression and anxiety “due to mycotoxin exposure,” would  
16 have pain occasionally or frequently interfere with her attention and concentration needed to perform  
17 simple work tasks, would frequently have stress severe enough to interfere with her attention and  
18 concentration needed to perform simple work tasks, and suffered from: limited vision; memory lapses;  
19 need to avoid temperature extremes, dust, and fumes; chronic fatigue; chemical sensitivity; foggy  
20 brain; difficulty concentrating; blurry vision. AR 778-79. He marked that Plaintiff would be “off  
21 task” more than 30 percent of the time, would likely be absent from work five days or more per  
22 month, would likely be unable to complete an eight-hour workday for five days or more per month,  
23 and would be 50% or less efficient than an average worker in performing an eight hour per day, five  
24 day per week job on a sustained basis. Dr. Pietruszka checked that Plaintiff would be unable to obtain  
25 and retain work in a competitive work environment eight hours per day, five days per week for a  
26 continuous period of six months or more because Plaintiff “continues to be symptomatic after  
27 mycotoxin exposure. Health is getting worse and she has good days and bad days but more bad days  
28 than good days.” AR 779. He checked that Plaintiff could manage benefit payments and checked that

1 he based his opinion upon the history and medical file; progress and office notes; physical  
2 examinations; laboratory tests and other tests; x-rays; CT scans; consultative medical opinions; and  
3 psychological evaluations. *Id.*

4 In evaluating Dr. Pietruszka's opinions, the ALJ summarized Dr. Pietruszka's findings and  
5 reasoned as follows:

6 Marvin Pietruszka, M.D., opined that the claimant could occasionally lift  
7 up to twenty pounds; must lie down for one to two hours at a time for up  
8 to three hours in an eight-hour day; sit for two to three hours; requires  
9 unscheduled breaks; would be absent for five days or more per month;  
10 and would be unable to complete an eight-hour workday five or more days  
11 per month (9F). Marvin Pietruszka, M.D., opined that the claimant was  
12 precluded from working in an environment in which she would be re-  
13 exposed to mold (94F/10). Dr. Pietruszka also noted that the claimant was  
14 disabled (8F/33). These opinions are not found to be fully persuasive.  
15 While the record contains voluminous treatment notes, the extent of the  
16 limitations is not fully consistent with the overall evidence and reported  
17 activities. The claimant's symptoms showed improvement with treatment  
18 of her CIRS (65F/13). Her attention span was within normal limits (4F/6,  
19 23F/60). The claimant's working memory, recall memory, and executive  
20 functioning were within normal limits (23F/60). She was able to perform  
21 digit-span testing forwards and backwards (64F/38, 68F/27). Her thought  
22 process was linear (4F/6). The claimant was able to recall three items  
23 immediately and two of three after a delay (4F/6). She was cooperative  
24 on exam (4F/6). Additionally, the claimant denied having any suicidal  
25 ideation (4F/6). As far as physical functioning, there was no evidence of  
any gait abnormality (7F/5, 33F/3, 75F/3, 10, 82F/3, 8). No swelling was  
noted in the claimant's extremities (75F/3, 10). She had normal lung  
exams as well (7F/4, 33F/2, 48F/15, 75F/10, 79F/4). Further, the claimant  
had normal cardiovascular exams (7F/4, 79F/1, 4). The claimant had  
normal musculoskeletal strength (7F/5, 48F/17). Her sensation was intact  
(7F/5, 48F/17). Extremity range of motion testing was within normal  
limits (7F/5). Straight leg raise testing was negative (7F/4). Finger-to-  
nose testing was performed without difficulty (48F/17). Regarding  
activities, the claimant reported being able to pay bills and count change  
(4E/5). She also reported being able to shop for groceries (4E/5). Further,  
she indicated that she was doing yoga and trying to walk (68F/7). As such,  
the overall evidence, including reported activities, is not consistent with  
the full extent of the opined limitations.

26 AR 25-26.

27 The Court finds that the ALJ properly evaluated Dr. Pietruszka's opinion under the new  
28 regulations. First, the ALJ's reasoning regarding the overall evidence invokes the consistency factor,

1 which means the extent to which a medical opinion is “consistent ... with the evidence from other  
 2 medical sources and nonmedical sources in the claim.” *Woods*, 32 F.4th at 792 (citing 20 C.F.R. §  
 3 404.1520c(c)(2)).

4 In contrast to Dr. Pietruszka’s opined limitations, the ALJ noted that Plaintiff’s symptoms  
 5 showed improvement with treatment of her CIRS. AR 2067 (noting treatments and that “patient has  
 6 improved with treatment of her Chronic Inflammatory Response Syndrome, providing further  
 7 evidence that it is the correct diagnosis.”). In terms of mental limitations, the ALJ noted that  
 8 Plaintiff’s attention span was within normal limits, her working memory, recall memory, and  
 9 executive functioning were within normal limits; Plaintiff could perform digit-span testing forwards  
 10 and backwards; Plaintiff’s thought process was linear; Plaintiff could recall three items immediately  
 11 and two items of three items after a delay; Plaintiff was cooperative on exam; and Plaintiff denied  
 12 suicidal ideation. AR 26; 659 (homicidal and suicidal ideation denied, memory findings noting recall  
 13 of 3/3 “right away” and 2/3 “after 5 minutes,” attitude was “cooperative,” linear thought process, and  
 14 attention span was “Within normal limits”); 997 (“Sustained Attention” and “Controlled Attention” in  
 15 “expected range”; working memory, recall memory, and executive function in “expected range”);  
 16 2001 (for attention test, Plaintiff could repeat a list of digits in forward and backward order); 2110 (for  
 17 attention test, Plaintiff could repeat a list of digits in forward and backward order). The ALJ further  
 18 noted that Plaintiff showed no evidence of gait abnormality and no swelling in extremities. AR 26;  
 19 2333 (“No swelling in extremities” and “moving all four extremities, no focal deficits observed on  
 20 gross examination”); 2340 (“No swelling in extremities” and “moving all four extremities, no focal  
 21 deficits observed on gross examination”); 725 (“Gait: Within normal limits”); 1081 (“Gait and station  
 22 are steady... Motor function is intact x4 extremities...”); 2399 (“Gait and station are steady... Motor  
 23 function is intact x4 extremities...”); 2404 (“Normal gait”). The ALJ also noted normal findings for  
 24 lung exams. AR 26, 724 (“Lungs: Breath sounds are symmetric. There are no wheezes, rhonchi or  
 25 rales. The expiratory phase is within normal limits.”); 1080 (“Lungs: Grossly clear to auscultation. No  
 26 wheezing or tachypnea. No cough of significance today.”); 1285 (“Lungs: Clear to auscultation and  
 27 percussion. No E to A changes or use of accessory muscles or inspiration. No fremitus.”); 2340  
 28 (“Lungs: Equal air entry in both lung fields with no added breath sounds on auscultation, normal

1 respiratory effort”); 2364 (“LUNGS: Clear to auscultation. Anterior chest: There is discomfort to  
2 palpation in the very left upper chest aspect towards the left shoulder.”). The ALJ also noted that  
3 Plaintiff’s cardiovascular findings, musculoskeletal strength findings, sensation findings, and  
4 extremity range of motion findings were normal or within normal limits. AR 26; 724 (normal  
5 cardiovascular findings and normal back findings including note that “Straight leg raising is negative  
6 at 90 degrees.”); 725 (findings for shoulders, elbows, wrists, hips, knees, ankles findings; “Motor  
7 strength was 5/5 in all extremities with good tone bilaterally with good active range of motion”); 1287  
8 (Neurological Examination: “Finger-to-nose motion performed without difficulty,” and “Strength and  
9 sensation are intact”); 2361 (“CARDIOVASCULAR: Regular rate and rhythm without murmur or  
10 gallop”); 2364 (“CARDIOVASCULAR: Regular rate and rhythm without murmur, gallop, rub, heave,  
11 or click”). The ALJ’s examination of the medical record therefore supported her discounting Dr.  
12 Pietruszka’s opinion through the consistency factor.

13         Second, the ALJ found that Dr. Pietruszka’s opined limitations, though based upon the record  
14 containing “voluminous treatment notes,” were not fully consistent with the overall evidence. AR 26.  
15 The ALJ’s addressing of Dr. Pietruszka’s treatment notes invokes the supportability factor, which  
16 means the “extent to which a medical source supports the medical opinion by explaining the ‘relevant  
17 ... objective medical evidence.’” *Woods*, 32 F.4th at 791-92. (citing 20 C.F.R. § 404.1520c(c)(1)).  
18 The ALJ’s citation of the voluminous treatment notes suggests that there was greater supportability of  
19 Dr. Pietruszka’s opinions. While this suggests that the opinions were internally supported by Dr.  
20 Pietruszka’s notes, the ALJ nevertheless addressed the important factor of supportability as part of her  
21 analysis. The ALJ’s analysis is therefore supported by the ALJ’s examination of the supportability  
22 factor.

23         Third, the ALJ noted that Dr. Pietruszka’s opinion was also inconsistent with Plaintiff’s  
24 reported activities. AR 26. An ALJ may discount a physician’s opinion when it is inconsistent with  
25 the claimant’s reported activities. *Morgan v. Comm’r*, 169 F.3d 595, 600-02 (9th Cir. 1999) (finding  
26 that the inconsistency between medical opinion and reported daily activities was a specific and  
27 legitimate reason for the ALJ to reject a treating physician’s opinion). In discussing Plaintiff’s  
28 activities, the ALJ noted Plaintiff’s daily activities, including being able to: pay bills, count change,

1 shop for groceries, do yoga, and attempt to walk. AR 354 (Plaintiff noting that she goes outside six  
2 days a week and can: shop in stores for groceries one to two times every three weeks; pay bills, count  
3 change, handle a savings account, and use a checkbook and money orders; go out alone; and travel by  
4 walking or driving a car); 2090 (“The patient notes... She is doing yoga, walking”). The Court  
5 therefore finds the ALJ appropriately discounted Dr. Pietruszka’s opinion given Plaintiff’s relatively  
6 intact daily activities.

7 Plaintiff contends that the ALJ did not articulate how Plaintiff’s activities were inconsistent  
8 with Dr. Pietruszka’s opined limitations. (Doc. 17 at 21-22.) However, Plaintiff’s allegations of  
9 disabling impairments contrast with Plaintiff’s stated abilities, including that she goes outside six days  
10 a week, can go out alone, can do accounting tasks like paying bills, counting change, handling a  
11 savings account, and using a checkbook. AR 354. This allows the Court to discern the agency’s path  
12 in utilizing Plaintiff’s activities in discounting Dr. Pietruszka’s opined limitations. Accordingly, the  
13 ALJ did not err. *See Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“Even when an agency  
14 ‘explains its decision with ‘less than ideal clarity,’ we must uphold it ‘if the agency’s path may  
15 reasonably be discerned.’”)

16 Plaintiff further contends that the ALJ did not appropriately address the consistency of  
17 Plaintiff’s fatigue symptoms with the broader medical record, “as fatigue is not measured by any of  
18 the tests or findings cited by the ALJ.” (Doc. 17 at 21-22.) However, the ALJ discussed Plaintiff’s  
19 activities that weigh against Plaintiff’s allegations of disabling fatigue. AR 26; 354 (Plaintiff noting  
20 that she goes outside six days a week and can: shop in stores for groceries one to two times every three  
21 weeks; pay bills, count change, handle a savings account, and use a checkbook and money orders; go  
22 out alone; and travel by walking or driving a car). While the ALJ did not expressly discuss fatigue in  
23 explaining why she discounted Dr. Pietruszka’s opinion, the ALJ addressed findings from the medical  
24 record that suggest the fatigue was less than disabling, including an attention span within normal  
25 limits; working memory, recall memory, and executive function within normal limits; a linear thought  
26 process; normal musculoskeletal strength; and no evidence of gait abnormality. AR 26. Additionally,  
27 the ALJ did not rule out all limitations imposed by fatigue altogether but instead explained how she  
28 incorporated some degree of fatigue limitations into Plaintiff’s RFC. *See* AR 23-24 (“The overall

1 evidence, including the claimant’s reported chronic fatigue, supports a limitation to the reduced range  
 2 of the light exertional level, specifically that the claimant can lift and carry up to twenty pounds  
 3 occasionally and ten pounds frequently; stand and walk for about six hours and sit for about six hours  
 4 in an eight-hour workday with normal breaks. Given her fatigue, functional complaints, and  
 5 respiratory complaints, the claimant can never climb ladders, ropes or scaffolds, but occasionally  
 6 climb ramps or stairs... Given her fatigue, she can have no exposure to unprotected heights and no use  
 7 of moving hazardous machinery.”) The ALJ therefore did not err in not including a further discussion  
 8 of Plaintiff’s fatigue in discounting Dr. Pietruszka’s opined limitations.

9 Plaintiff also contends that the ALJ should have interpreted the evidence as demonstrating that  
 10 Plaintiff’s capacity varied depending on her level of fatigue, citing the administrative record. (Doc. 17  
 11 at 23.) While Plaintiff puts forward her interpretation of the record, where “evidence is susceptible to  
 12 more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.” *Woods*, 32 F.4th  
 13 at 788 (citing *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *see also Tommasetti v. Astrue*,  
 14 533 F.3d 1035, 1041 (9th Cir. 2008) (“the ALJ is the final arbiter with respect to resolving ambiguities  
 15 in the medical evidence.”). Plaintiff’s alternate interpretation of the record therefore does not  
 16 demonstrate that the ALJ erred.

17 Accordingly, the ALJ did not err in discounting Dr. Pietruszka’s opinion.

## 18 2. Opinions of Dr. Jim

19 Dr. Lysander Jim issued three sets of opined limitations. First, on March 27, 2019, Dr. Jim  
 20 completed a Physical Residual Function Capacity Medical Source Statement, in which he noted  
 21 Plaintiff’s diagnoses as “chronic inflammatory response syndrome, mast cell activation syndrome,  
 22 chronic fatigue syndrome, restrictive lung disease” and listed the prognosis as “Guarded – likely  
 23 permanent disability.” AR 1980. Plaintiff’s symptoms were listed as memory loss, brain fog,  
 24 shortness of breath, palpitations, fatigue, numbness, and blurry vision, and Dr. Jim noted that  
 25 Plaintiff’s pain resulted from body aches and pains which varied from mild to severe and were worse  
 26 with mold exposure, stress and other factors. *Id.* Dr. Jim listed Plaintiff’s most significant clinical  
 27 findings as severe memory loss, facial rash, and aches throughout body, and marked that Plaintiff’s  
 28 impairments, symptoms, and limitations lasted since the date Plaintiff claimed she could no longer



1 work. *Id.* Dr. Jim marked that Plaintiff could occasionally lift 20 pounds or more, could not walk one  
2 city block or more without rest or severe pain, could not walk one block or more on rough or uneven  
3 ground, and could not climb steps without use of a handrail at a reasonable pace. AR 1980-81. Dr.  
4 Jim marked that Plaintiff had problems with balance while ambulating and had problems with  
5 stooping, crouching, and bending. AR 1981. He marked that Plaintiff must lie down or recline for  
6 one to two hours before needing to sit up, stand up, or walk around due to fatigue, pain, stress, and  
7 “heart valve/leaky valve.” *Id.* Dr. Jim marked that Plaintiff would need to lie down and/or recline  
8 approximately two to three hours during an eight-hour workday. *Id.* He also marked that Plaintiff  
9 could sit approximately two to three hours and stand and walk approximately two to four hours in an  
10 eight-hour workday. *Id.* Dr. Jim also noted that Plaintiff would need to take an unscheduled break  
11 every two to three hours, would have to rest two hours before returning to work, and would need to lie  
12 down or sit quietly during the breaks. AR 1981-82. He checked that Plaintiff did not need to elevate  
13 her legs during prolonged sitting, would not need a cane or other assistive device while walking, could  
14 do hand, finger, and arm manipulations “100%” of the time during an eight-hour workday, could not  
15 push and pull arm or leg controls from a sitting position for six or more hours per eight-hour workday,  
16 could climb stairs and ramps, and could not climb ladders or scaffolds or ropes. AR 1982. Dr. Jim  
17 checked that Plaintiff’s pain would be severe enough to occasionally or frequently interfere with  
18 attention and concentration needed to perform simple work tasks, and Plaintiff’s stress would be  
19 severe enough to frequently interfere with the attention and concentration needed to perform simple  
20 work tasks. *Id.* He marked that Plaintiff’s limitations included memory lapses, need to avoid  
21 temperature extremes, dust, and fumes. *Id.* Dr. Jim marked that Plaintiff would be “off task” more  
22 than 30 percent of the time, would likely be absent from work five days or more per month, would  
23 likely be unable to complete an eight-hour workday for five days or more per month, and would be  
24 50% or less efficient than an average worker in performing an eight hour per day, five day per week  
25 job on a sustained basis. AR 1983. He marked that Plaintiff would be unable to obtain and retain  
26 work in a competitive work environment eight hours per day, five days per week for a continuous  
27 period of six months or more. *Id.* He also checked that Plaintiff could manage benefit payments and  
28



1 checked that he based his opinion upon the history and medical file; progress and office notes;  
2 physical examinations; laboratory tests and other tests; and x-rays, CT scans or MRIs. *Id.*

3       Second, on August 5, 2020, Dr. Jim completed a mental residual functional capacity  
4 questionnaire. AR 2010-13. In this questionnaire, Dr. Jim marked that Plaintiff's impairments  
5 precluded performance for fifteen percent or more of an eight-hour workday as to: remembering  
6 locations and work-like procedures, understanding and remembering very short and simple  
7 instructions, understanding and remembering detailed instructions, carrying out detailed instructions,  
8 maintaining attention and concentration for extended periods of time, performing activities within a  
9 schedule, maintaining regular attendance, being punctual and within customary tolerances, sustaining  
10 an ordinary routine without special supervision, working in coordination with or in proximity to others  
11 without being distracted by them, making simple work-related decisions, completing a normal  
12 workday and workweek without interruptions from psychologically based symptoms, performing at a  
13 consistent pace without an unreasonable number and length of rest periods, being aware of normal  
14 hazards and taking appropriate precautions, and setting realistic goals or making plans independently  
15 of others. AR 2011-12. He also marked that Plaintiff's impairments precluded performance for ten  
16 percent or more of an eight-hour workday as to carrying out very short and simple instructions,  
17 traveling in unfamiliar places or using public transportation. AR 2012. He marked that Plaintiff's  
18 impairments precluded performance for five percent or more of an eight-hour workday as to  
19 maintaining socially appropriate behavior and adhering to basic standards of neatness and cleanliness,  
20 and responding appropriately to changes in the work setting. *Id.* He further marked that Plaintiff was  
21 not precluded as to: interacting appropriately with the general public, asking simple questions or  
22 requesting assistance, accepting instructions and responding appropriately to [critiques] from  
23 supervisors, and getting along with coworkers or peers without distracting them or exhibiting  
24 behavioral extremes. *Id.* Dr. Jim marked that Plaintiff was likely to be absent from work or unable to  
25 complete an eight-hour workday due to her physical and/or mental impairments five days or more per  
26 month. AR 2013. He also wrote that Plaintiff had reduced intellectual functioning due to "impaired  
27 memory, executive function, focus, word-finding & learning ability," checked that Plaintiff could  
28 manage benefit payments, and checked that Plaintiff was not a malingerer. *Id.*

1 Third, on August 5, 2020, Dr. Jim completed an additional Physical Residual Function  
2 Capacity Medical Source Statement. AR 2014-17. His August 5, 2020 opined limitations were  
3 substantially similar to the March 27, 2019 medical source statement, except that in the August 5,  
4 2020 statement, Dr. Jim marked that Plaintiff: must lie down or recline for one to three hours before  
5 needing to sit up, stand up, or walk around; could sit approximately one to three hours; could stand  
6 and walk approximately one to three hours in an eight-hour workday; would need four unscheduled  
7 breaks in which Plaintiff would need to lie down or sit quietly for two hours before returning to work;  
8 must elevate her legs when sitting for a prolonged period; would occasionally, frequently, or  
9 constantly have pain severe enough to interfere with attention and concentration needed to perform  
10 simple work tasks; would constantly have stress severe enough to interfere with attention and  
11 concentration needed to perform simple work tasks; and had additional limitations including I.Q.  
12 limitations and the need to avoid wetness, humidity, and noise. AR 2014-17. Dr. Jim also marked  
13 that Plaintiff would be “off task” more than 30 percent of the time, would likely be absent from work  
14 five days or more per month, would likely be unable to complete an eight-hour workday for five days  
15 or more per month, and would be 50% or less efficient than an average worker in performing an eight  
16 hour per day, five day per week job on a sustained basis. AR 2017. He marked that Plaintiff would be  
17 unable to obtain and retain work in a competitive work environment eight hours per day, five days per  
18 week for a continuous period of six months or more. *Id.* He also checked that Plaintiff could manage  
19 benefit payments and marked that he based his opinion upon the history and medical file; progress and  
20 office notes; physical examinations; laboratory tests and other tests; psychological evaluations; and x-  
21 rays, CT scans or MRIs. *Id.*

22 In evaluating Dr. Jim’s opinion, the ALJ summarized Dr. Jim’s findings and reasoned as  
23 follows:

24 Lysander Jim, M.D., opined that the claimant could occasionally lift up to  
25 twenty pounds; must lie down for one to two hours at a time for up to  
26 three hours in an eight-hour day; sit for two to three hours; requires  
27 unscheduled breaks; would be absent for five days or more per month;  
28 and would be unable to complete an eight-hour workday five or more days  
per month (64F/17-20, 51-54). Dr. Jim also opined that the claimant’s  
impairments precluded the performance of remembering work-like

procedures, completing a normal workday, making simple work-related decisions, and setting realistic goals for fifteen percent or more of the day (64F/47-50). This opinion is not found to be fully persuasive. While it is supported with treatment notes, the extent of the limitations is not fully consistent with the overall evidence and reported activities. The claimant's symptoms improved with treatment of her CIRS (65F/13). The record reveals her attention span was within normal limits (4F/6, 23F/60). The claimant's working memory, recall memory, and executive functioning were within normal limits (23F/60). She was able to perform digit-span testing forwards and backwards (64F/38, 68F/27). Her thought process was linear (4F/6). The claimant was able to recall three items immediately and two of three after a delay (4F/6). She was cooperative on exam (4F/6). Additionally, the claimant denied having any suicidal ideation (4F/6). As far as physical functioning, there was no evidence of any gait abnormality (7F/5, 33F/3, 75F/3, 10, 82F/3, 8). No swelling was noted in the claimant's extremities (75F/3, 10). She had normal lung exams as well (7F/4, 33F/2, 48F/15, 75F/10, 79F/4). Further, the claimant had normal cardiovascular exams (7F/4, 79F/1, 4). The claimant had normal musculoskeletal strength (7F/5, 48F/17). Her sensation was intact (7F/5, 48F/17). Extremity range of motion testing was within normal limits (7F/5). Straight leg raise testing was negative (7F/4). Finger-to-nose testing was performed without difficulty (48F/17). Regarding activities, the claimant reported being able to pay bills and count change (4E/5). She also reported being able to shop for groceries (4E/5). Further, she indicated that she was doing yoga and trying to walk (68F/7). As such, the overall evidence, including reported activities, is not entirely consistent with the full extent of the opined limitations.

AR 27-28.

The Court finds that the ALJ properly evaluated Dr. Jim's opinion under the new regulations. First, the ALJ's reasoning regarding the overall evidence invokes the consistency factor, which means the extent to which a medical opinion is "consistent ... with the evidence from other medical sources and nonmedical sources in the claim." *Woods*, 32 F.4th at 792 (citing 20 C.F.R. § 404.1520c(c)(2)). The ALJ noted that Plaintiff's symptoms showed improvement with treatment of her CIRS. AR 27; 2067. In terms of mental limitations, the ALJ noted that Plaintiff's attention span was within normal limits, her working memory, recall memory, and executive functioning were within normal limits; Plaintiff could perform digit-span testing forwards and backwards; Plaintiff's thought process was linear; Plaintiff could recall three items immediately and two items of three items after a delay; Plaintiff was cooperative on exam; and Plaintiff denied suicidal ideation. AR 27; 659; 997; 2001;

1 2110. The ALJ further noted that Plaintiff showed no evidence of gait abnormality and no swelling in  
2 extremities. AR 27; 2333; 2340; 725; 1081; 2399; 2404. The ALJ also noted normal findings for lung  
3 exams. AR 27, 724; 1080; 1285; 2340; 2364. The ALJ found that Plaintiff's cardiovascular findings,  
4 musculoskeletal strength findings, sensation findings, and extremity range of motion findings were  
5 normal or within normal limits. AR 27; 724; 725; 1287; 2361; 2364. The ALJ's examination of the  
6 medical record therefore supported her discounting Dr. Jim's opinion through the consistency factor.

7 Second, the ALJ found that Dr. Jim's opined limitations, though "supported by treatment  
8 notes," were not fully consistent with the overall evidence. AR 27. The ALJ's addressing of Dr. Jim's  
9 treatment notes invokes the supportability factor, which means the "extent to which a medical source  
10 supports the medical opinion by explaining the 'relevant ... objective medical evidence.'" *Woods*, 32  
11 F.4th at 791-92. (citing 20 C.F.R. § 404.1520c(c)(1)). The ALJ's citation of the treatment notes  
12 suggests that there was some degree of supportability of Dr. Jim's opinions. While this suggests that  
13 the opinions were at least partially supported by Dr. Jim's notes, the ALJ nevertheless addressed the  
14 important factor of supportability as part of her analysis. The ALJ's analysis is therefore supported by  
15 the ALJ's examination of the supportability factor.

16 Third, the ALJ noted that Dr. Jim's opinion was also inconsistent with Plaintiff's reported  
17 activities. AR 28. An ALJ may discount a physician's opinion when it is inconsistent with the  
18 claimant's reported activities. *Morgan*, 169 F.3d at 600-02. In discussing Plaintiff's activities, the  
19 ALJ noted Plaintiff's daily activities, including being able to: pay bills, count change, shop for  
20 groceries, do yoga, and attempt to walk. AR 28; 354; 2090. The Court therefore finds the ALJ  
21 appropriately discounted Dr. Jim's opinion given Plaintiff's relatively intact daily activities.

22 Plaintiff contends that the ALJ did not articulate how Plaintiff's activities were inconsistent  
23 with Dr. Jim's opined limitations. (Doc. 17 at 22.) However, Plaintiff's allegations of disabling  
24 impairments contrast with Plaintiff's stated abilities, including that she goes outside six days a week,  
25 can go out alone, can do accounting tasks like paying bills, counting change, handling a savings  
26 account, and using a checkbook. AR 38; 354. This allows the Court to discern the agency's path in  
27 utilizing Plaintiff's activities in discounting Dr. Jim's opined limitations. Accordingly, the ALJ did  
28 not err. *See Molina*, 674 F.3d at 1121.

1 Plaintiff further contends that the ALJ did not appropriately address the consistency of  
 2 Plaintiff's fatigue symptoms with the broader medical record, "as fatigue is not measured by any of  
 3 the tests or findings cited by the ALJ." (Doc. 17 at 22-23.) However, the ALJ discussed Plaintiff's  
 4 activities that contrast with Plaintiff's allegations of disabling fatigue. AR 28; 354. While the ALJ  
 5 did not expressly discuss fatigue in explaining why she discounted Dr. Jim's opinion, the ALJ  
 6 addressed findings from the medical record that suggest the fatigue was less than disabling, including  
 7 an attention span within normal limits; working memory, recall memory, and executive function  
 8 within normal limits; a linear thought process; normal musculoskeletal strength; and no evidence of  
 9 gait abnormality. AR 27. Additionally, the ALJ did not rule out all limitations imposed by fatigue but  
 10 instead explained how she incorporated some degree of fatigue limitations into Plaintiff's RFC. *See*  
 11 AR 23-24. The ALJ therefore did not err in not including a further discussion of Plaintiff's fatigue in  
 12 discounting Dr. Jim's opined limitations.

13 Plaintiff also contends that the ALJ should have interpreted the evidence as demonstrating that  
 14 Plaintiff's capacity varied depending on her level of fatigue, citing the administrative record. (Doc. 17  
 15 at 23.) While Plaintiff puts forward her interpretation of the record, where "evidence is susceptible to  
 16 more than one rational interpretation, it is the ALJ's conclusion that must be upheld." *Woods*, 32 F.4th  
 17 at 788; *see also Tommasetti*, 533 F.3d at 1041. Plaintiff's alternate interpretation of the record  
 18 therefore does not demonstrate that the ALJ erred.

19 Accordingly, the ALJ did not err in discounting Dr. Jim's opinion.

## 20 **CONCLUSION AND ORDER**

21 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial  
 22 evidence in the record as a whole and is based on proper legal standards. Accordingly, IT IS  
 23 HEREBY RECOMMENDED as follows:

- 24 1. Plaintiff's appeal from the administrative decision of the Commissioner of Social  
 25 Security be denied; and
- 26 2. The Clerk of this Court be directed to enter judgment in favor of Defendant Martin  
 27 O'Malley, Commissioner of Social Security, and against Plaintiff Danae Schmitzer.

IT IS SO ORDERED.

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE